United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

76-5039

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

P/S

NO. 76-5039

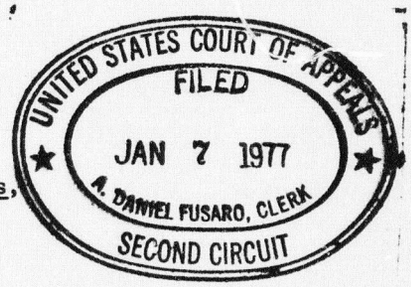
In re

REA HOLDING CORPORATION
THE EXPRESS COMPANY
REA EXPRESS, INC., f/k/a
Railway Express Agency, Inc.
REXCO SUPPLY CORPORATION,

Bankrupts.

MATTHEW E. MANNING, ANTHONY SATRIANO, DANIEL S. GILHULY, VINCENT PONTILLO, WILLIAM R. WEGL, EDMUND F. NOVITSKI, EDWARD J. COX, ANTHONY J. JANUZZI, CHARLES F. MC GOVERN and JAMES J. KILCOYNE,

Creditors-Appellants,



BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,

Intervenor,

v.

C. ORVIS SOWERWINE, Trustee in Bankruptcy,

Appellee.

On Appeal From The United States District Court
For The Southern District Of New York

BRIEF OF INTERVENOR BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS

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December 8, 1976

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ISSUES PRESENTED*

In the opinion of intervenor Brotherhood of Railway and Airline Clerks, the following issues are presented by this appeal and will be addressed in this brief:

1. Were the procedures followed by the District Court in dismissing appellants' petition under Chapter X of the Bankruptcy Act so lacking in fundamental fairness that appellants and other creditors were deprived of due process of law because they were not given a fair opportunity to be heard.

2. Did appellants' application for the appointment of a Receiver, and their oral motion at the hearing to remove the Trustee, sufficiently raise the issue of a conflict of interest on the part of the Trustee so as to require the Bankruptcy Court to consider that issue.

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* Appellants have proposed that seven issues be raised on this appeal; because of the lack of time in which to review thoroughly the facts and the law on those issues, intervenor Brotherhood of Railway and Airline Clerks has selected those issues which it considers to be the most obvious. By not addressing the remaining issues, intervenor does not mean to suggest that they are without merit.

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NO. 76-5039

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Creditors-Appellants,

BROTHERHOOD OF RAILWAY, AIRLINE AND
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EXPRESS AND STATION EMPLOYES,

Intervenor,

v.

C. ORVIS SOWERWINE, Trustee in Bankruptcy,

Appellee.

On Appeal From The United States District Court
For The Southern District Of New York

BRIEF OF INTERVENOR BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS

Appellant Matthew E. Manning and nine other creditors-appellants herein filed a petition that REA Express, Inc., an adjudicated bankrupt, be recognized under Chapter X of the Bankruptcy Act. 11 U.S.C. §§501-676. During that same time period, appellants and approximately 150 creditors filed an application for an appointment of a Receiver, pursuant to Rules 201 and 10-201 of the Bankruptcy Rules. Both the petition for a Chapter X

reorganization and the application for an appointment of a Receiver were referred to United States District Court Judge Lloyd F. MacMahon of the United States District Court for the Southern District of New York. Judge MacMahon, on September 27, 1976, referred the matter to the Honorable John J. Galgay, Bankruptcy Judge, who conducted an inquiry into the matter that same day, and on September 28, 1976, issued a report recommending that appellants' petition under Chapter X be dismissed because it had not been filed in good faith. Judge Galgay further recommended that the application for the appointment of a Receiver be denied. On September 29, 1976, counsel for the Trustee C. Orvis Sowerwine orally moved before Judge MacMahon to confirm the Bankruptcy Court's report, and on September 30, 1976, the District Court granted that motion ordering that the petition under Chapter X be dismissed. On October 8, 1976, appellants noted an appeal of the District Court's order of September 30, 1976, and this appeal followed.

On November 8, 1976, the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes [hereinafter, "BRAC"] moved for leave to intervene in support of appellants. On November 19, 1976, this Court granted that motion "provided that [BRAC] . . . comply with the scheduling order issued November 12, 1976 by this court and not delay prosecution of this appeal." Shortly after appellants had noted their appeal, counsel for appellants were enjoined by the Bankruptcy Court from further prosecution of this instant appeal. That injunction, to intervenor BRAC's information and belief, is still in effect as of the date that this brief has been filed.

STATEMENT OF THE CASE

A. REA's Decline

For several years prior to 1975, REA Express, Inc. [hereinafter, "REA"], was experiencing financial difficulties, and finally, on February 18, 1975, REA filed a petition for an arrangement under Chapter XI of the Bankruptcy Act. 11 U.S.C. §701, et seq. REA continued to operate as a debtor in possession and continued to suffer great financial losses. For example, between February 18, 1975, and September 28, 1975, REA lost approximately $15,790,000.00. It has also been estimated that the total administrative expenses incurred but unpaid during the Chapter XI proceedings were in the neighborhood of $19,000,000.00. Trustee's brief of September 24, 1976, at 3. Finally, on November 6, 1975, REA, unable to meet its payroll, requested that it be adjudicated a bankrupt and on November 6, 1975, that order was entered.

Mr. C. Orvis Sowerwine qualified as a Trustee on November 7, 1976, and began to liquidate the estate. According to the Trustee:

> All of the terminals have been disposed of and all of the rolling stocks and all other operating asserts sold. The operating rights consisting of the aggregate rights to haul freight over the roads and on railroads both state and federal have also been sold and the successful bidder [Alltrans-U.S.A.] is prosecuting approval of his purchase before the Interstate Commerce Commission . . . , while an unsuccessful bidder [REAEMCO] is appealing the decision to the District Court. Only a few isolated parcels of real estate remain unsold, and the Trustee is, of course, pursuing various claims. Indeed, at the present time, the Trustee has on deposit in interest bearing accounts in various authorized banks nearly seven million dollars. Trustee's brief, supra, 3-4.

REA used to enjoy authority from both the Interstate Commerce Commission and the Civil Aeronautics Board to engage in an essentially express freight forwarding operating by air, truck and rail, but recently those certificates

have been the subjects of proceedings before the administrative agencies. REA's air freight authority has been revoked by the CAB, and that decision has been upheld by this Court. REA Express, Inc. v. CAB, 524 F.2d 54 (2nd Cir. 1975), cert. denied, ___U.S. ___ (1976). By an order issued November 19, 1976, the ICC has revoked REA's main temporary authority and has strongly intimated that all of REA's remaining temporary authority should also be revoked. Brada Miller Freight System, Inc. v. REXCO, Inc., No. MC-C-8862, et al. By pleadings filed and lodged on December 7, 1976, intervenor BRAC has requested the ICC to reconsider its revocation order.

While the Trustee was beginning to liquidate REA, he considered a proposal by a newly formed corporation, REAEMCO, to purchase REA's stock and ICC operating authority. The Trustee, however, declined to recommend the REAEMCO proposal to the Bankruptcy Court and, instead, recommended that the operating authority be sold to Alltrans. After conducting a hearing into that proposal, and after listening to the counterproposal made by REAEMCO, the Bankruptcy Court concluded that the interests of the estate could best be served by approving the sale of the bare certificate authority to Alltrans. That decision has been appealed to the District Court by REAEMCO.

B. Chapter X Petition

During the hearing conducted by the Bankruptcy Court into the Alltrans proposal, counsel for REAEMCO informed the Court that he had a petition signed by ten creditors with claims totalling approximately $20,000.00 seeking a reorganization of REA under Chapter X of the Bankruptcy Act. Tr. of 6/24/76 at 128-29.[1/] Counsel at first said he "intended" to present

1/ The record on appeal contains several transcripts separately paginated, and in order to avoid confusion, each transcript will be referred to by date as well as page.

it to the Court (id. at 128), but the next day the following comments occurred (Tr. of 6/25/76 at 102):

> The Judge: . . . But let me say this: Let the record be clear, Mr. Wisehart, that you have not formally filed a petition, lest some automatic stays or some other things come into being that might wreak havoc with the administration of the estate at the moment.
>
> Mr. Wisehart: That's correct, we certainly do not wish to have that type of consequence. We have submitted it to you in view of the fact --
>
> The Judge: But not in the sense of any formal filing so as to invoke automatic stays.

Earlier that day, REAEMCO's counsel had stated that the "petition has been submitted for filing" and that the Court had reserved ruling on whether it should be filed. Id. at 99. At the conclusion of the hearings, on July 9, 1976, REAEMCO's counsel once again stated that the petition had been "submitted for [the Court's] . . . consideration for filing." Tr. of 7/9/76 at 107. Counsel added that under his interpretation of the applicable rules,

> the petition would be filed with the court rather than with the clerk because of what we believe is the effect of the automatic reference rule; so that Your Honor as we see it [had] to make a determination about the filing itself. Id. at 108.

When the Court issued its decision on July 16, 1976, it did not rule on the Chapter X petition filing question. When REAEMCO appealed that decision, it raised on appeal the issue of the failure of the Court to accept the petition for filing or to make findings with respect to the "propriety and desirability" of that petition.[2/]

2/ That appeal was argued on August 28, 1976, but on September 15, 1976, the District Court returned the file to the clerk because of an "apparent" filing of the Chapter X petition.

Several days after that appeal was heard before the District Court, appellants' counsel tendered the requisite filing fee and a duplicate petition by letter to the Clerk of the District Court on or about September 7, 1976. Apparently that tender was not accepted because a duplicate copy and not the original petition had been tendered. Finally, apparently at the suggestion of District Court Judge Milton Pollack on September 22, 1976, a verified duplicate original was filed that same day and the matter was set for a hearing before Judge MacMahon on September 27, 1976, even though no answer had yet been filed. The Trustee filed an answer on September 24, 1976, but that answer was not received by appellants' counsel until the day of the hearing. Tr. of 9/27/76 at 59-60.

C. Application For Appointment Of A Receiver

On September 15, 1976, the Bankruptcy Court issued an order to show cause on September 21, 1976, why appellants' and other creditors' application for the appointment of a Receiver should not be granted. In that application, appellants asserted that the Trustee and his counsel had a conflict of interest in dealing with the Chapter X petition because of their support for both the Alltrans proposal and the need to liquidate rather than reorganize REA. Application at 3-4. The application also intimated that other serious conflict of interest problems were present. Id. at 6-7. Appellants then relied upon Rules 201 and 10-201 to support their application for the appointment of a Receiver prior to conversion of the proceedings to one under Chapter X. Id. at 5-6.

When the hearing began on the application to appoint a Receiver, the Bankruptcy Judge raised the issue of whether the motion was properly before

him, as required by the Bankruptcy Rules, or whether it should have been before the District Court as apparently required by the local rules of that Court. The Court then ordered appellants' counsel to present the application to the District Court. Tr. of 9/21/76 at 11. That application was presented to the District Court and it, along with the Chapter X petition, was referred to Judge MacMahon for a hearing on September 27, 1976.

D. Proceedings On September 27, 1976

When the matters came on for a hearing before Judge MacMahon on September 27, 1976, the Court, after briefly listening to the issues involved, directed the parties to appear before Judge Galgay and instructed Judge Galgay to hear the facts and report back to the Court as to what his recommendations were. Tr. of 9/27/76 at 18. At that hearing, the Bankruptcy Court refused to consider any evidence concerning the conflict of interest issue of the Trustee and his counsel. Id. at 34-40. The Court refused to consider that issue because it agreed with counsel for the Trustee that in order to raise the conflict of interest issue, appellants had to make a written motion to remove the Trustee. Since a written motion with notice to the Trustee had not been filed, the Court concluded it was not properly before it. In making that ruling, the Court declined to accept an oral motion, pursuant to Rule 7(b), Fed. R. Civ. P. Tr. of 9/27/76 at 36, 38, 40.

When appellants began to address the Chapter X petition and requested that they be allowed to call three witnesses, the Court declined to hear that evidence after listening to a proffer of proof. Appellants stated that they wished to call Mr. Ralph Nogg to establish that it was reasonable to expect that REA could be reorganized. Tr. of 9/27/76 at 41-50. However, the

Court stated that it need not hear Mr. Nogg on this issue since it had already heard basically the same evidence from Mr. Nogg at the Alltrans hearing. Id. at 44, 50. The Court remained of that opinion even though appellants stated that they wished to offer evidence through Mr. Nogg of REA's former management's view that "there was a potential for a successful resumption of [REA's] activities." Id. at 46. The Court declined to hear that evidence since it did not "see any point in burdening an already over-burdened record with additional documents that could have been offered at a previous time." Id. at 48.

Appellants also proffered the testimony of Mr. Dermott Noonan to show that several thousand of REA's creditors were not included on the computerized notice list and that under a Chapter X proceeding, a notice system could be established to provide a system which would keep better track of creditors' claims. Id. at 50-55. Finally, the Court refused to hear testimony from Mr. Robert J. Devlin on the conflict of interest issue, and on the fact that the BRAC-REA employee creditors, who may have $50,000,000.00 in claims (id. at 22) and who under the Alltrans proposal may not be offered reemployment (Tr. of 7/9/76 at 146-149), would support the Chapter X petition to reorganize REA. Tr. of 9/27/76 at 56-57. At the conclusion of the proceedings, the Court stated that it would recommend that:

> [T]he Chapter X Petition was not filed in good faith and that it is unreasonable to expect that a plan or reorganization can be effected in a Chapter X proceeding.
>
> * * * *
>
> ... I have not acted with respect to the appointment of the Receiver for the reason that if the Chapter X proceeding is dismissed, it is not necessary. Id. at 115-16.

On September 28, 1976, the Court issued a report detailing its findings and conclusions and on September 30, 1976, the District Court confirmed those findings and ordered the Chapter X petition dismissed. 3/

ARGUMENT

I

Appellants And Other Creditors Were Denied Due Process Of Law Because They Were Not Given A Fair Opportunity To Be Heard

It is axiomatic that parties seeking the benefits of Chapter X of the Bankruptcy Act must establish that their petition to reorganize under that Chapter has been filed in good faith. E.g., Sections 141-244 of the Bankruptcy Act, 11 U.S.C. §§541-44. And it is also well established that the petitioners have the burden of showing that the filing has, in fact, been in good faith. E.g., Marine Harbor Properties, Inc. v. Manufacturers Trust Co., 317 U.S. 78 (1942). That burden, however, goes "hand in hand with the right to have a fair opportunity to be heard." In re Church E. Gates & Co., 97 F.2d 911, 912 (2nd Cir. 1938). Intervenor BRAC respectfully submits that in the case at bar, appellants and other creditors were denied that fair opportunity to be heard and, thus, were denied due process of law.

A. Appellants Did Not Have A Fair Hearing

As the transcript of the September 27, 1976, proceeding before the Bankruptcy Judge shows, that Court assumed that the record of the Chapter XI and bankruptcy proceedings already before him was sufficient to establish that appellants had not shouldered their burden of proving a good faith filing. Because of that assumption, the Court maintained the position that the hearing of further evidence would be superfluous. Intervenor BRAC

3/ Both the Report and Order are attached hereto as Appendices A and B, respectively.

respectfully submits that the Court's basic assumption was erroneous for it failed to consider adequately the distinction between the purposes of the Alltrans hearing and the good faith standards of Section 146 of the Bankruptcy Act, 11 U.S.C. §546.

REAEMCO's objections to the Alltrans proposal and the evidence which it presented at the hearing in June and July 1976 went to show that, in REAEMCO's opinion, its proposal to purchase the stock of REA was more advantageous for the estate than Alltrans' proposal to purchase the bare operating authority of REA. In rejecting REAEMCO's proposal, the Bankruptcy Court was required to weigh the two proposals and to determine which was best for the estate. That determination required an examination of the REAEMCO proposal and a consideration of whether that specific proposal, including its financing, was feasible. Intervenor respectfully submits that the analysis required by Section 146(3) of the Act, 11 U.S.C. §546(3), is different and a rejection of the REAEMCO proposal does not necessarily mean that "it is unreasonable to expect that a plan of reorganization can be effected . . . ."

Chapter X petitioners need not establish that reorganization is, without question, possible; rather, petitioners must establish that there is a reasonable possibility of successful reorganization. E.g., Grubbs v. Pettit, 282 F.2d 557 (2nd Cir. 1960). That burden is different, intervenor BRAC submits, than whether the REAEMCO proposal is feasible since the Court should not consider the details of a particular plan, but rather, whether reorganization is possible. E.g., Oglesby & Simpson Supply Co. v. Duggan, 174 F.2d 904 (8th Cir. 1949). Only after a Chapter X Trustee is

appointed do the details of a particular plan become material. Because of the Bankruptcy Court's failure to recognize the distinction between the thrust of the REAEMCO evidence and the standard of Section 146(3), appellants were denied the opportunity to show that reorganization was, in fact, possible; that others, including former REA management, considered it possible; and that such a prospect was feasible even in view of REA's almost liquidated state. Tr. of 9/27/76 at 42-50.

While it is true that much of what petitioners proffered at the Chapter X proceeding had already been presented during the Alltrans hearing, the fact remains, intervenor BRAC submits, that there was a vast distinction between the objects of the two proceedings. Consequently, as appellants' counsel indicated, the actual evidence to be presented would not be identical. That fact is clearly shown by the proffered exhibits (Tr. of 9/27/76 at 40-48), which the Court refused to accept because they had not been "offered at a previous time." Id. at 48.

Besides erroneously refusing to consider evidence to show that reorganization was possible, the Bankruptcy Court also erroneously refused to consider evidence to establish that the prior bankruptcy proceeding would not best subserve the interests of REA creditors and stockholders. That standard of good faith had been placed in issue by the answer of the Trustee to the Chapter X petition, and since appellants had the burden to prove that the standard had been met, they should have been given a fair opportunity to do so. In re Church E. Gates & Co., supra. In refusing to consider evidence on that issue, the Bankruptcy Court assumed that its inquiry was controlled by its earlier conclusion that:

> [I]t would be adverse to the interests of the bankrupt estate that any assets of the bankrupt presently in the hands of the Trustee be put at risk to enable the Trustee to continue to expand an express business . . . . Order of July 16, 1976, finding No. 6.

However, the basic facts are undisputed that at the present time the REA estate is not sufficient enough to pay fully the administration expenses, let alone begin to pay the creditors' pre-administration expenses. Moreover, appellants attempted to show that the BRAC-REA employee creditors (a class of creditors which could well be the majority class of creditors in dollar amount) favored a reorganization. Tr. of 9/27/76 at 55-57. Also, the record clearly shows that without a reorganization, most creditors will not receive any return on their accounts; only a reorganization can protect those accounts. Consequently, by failing to consider the feasibility of reorganization, the Court was not in a position to make a finding on what proceeding would, in fact, best subserve the interests of creditors and stockholders. See, Fidelity Assurance Assoc. v. Sims, 318 U.S. 608 (1943); Marine Harbor Properties, Inc. v. Manufacturers Trust Co., supra.

While intervenor BRAC acknowledges that findings of fact of the Bankruptcy Judge should not be set aside unless they are clearly erroneous, that principle of law does not, it is submitted, apply in this case. Intervenor BRAC is not on this appeal arguing that the Court's findings are not supported by the evidence; rather, BRAC respectfully submits that because of erroneous asseumptions of law, the Bankruptcy Court both failed to allow appellants to present evidence and, just as importantly, did not consider the evidence with a mind to be persuaded, but with a preconceived opinion that the petition was not filed in good faith. See, Tr. of 9/27/76 at 44

(to review evidence at leisure that night) and 112-16 (orally issued recommendations at end of proceeding). Intervenor PRAC respectfully submits that such procedural defects deprived appellants and other creditors of due process by not giving them a fair opportunity to be heard.

B. Failure To Give Notice Of Chapter X Proceeding

While there is, to say the least, some confusion as to when the Chapter X petition was, in fact, filed,[4/] it is clear that it was filed by at least September 22, 1976. It is also clear that the Bankruptcy Court never issued a summons to the debtor for an answer to be filed within twenty days as required by Sections 133 and 136 of the Act, 11 U.S.C. §§533, 536, and by Rules 10-111 and 10-112 of the Bankruptcy Rules. Moreover, it is also clear that no notice was given to other creditors of the fact that a hearing, as required by Rule 10-113(c)(2), was to be held on September 27, 1976, on the controverted issue of a good faith filing. As a direct result of these procedural defects, other creditors were not given either the time or the opportunity to intervene (Rules 10-113(a)(2) and 10-210) or in any other way to support the filing of appellants' petition. In view of the binding nature of the Bankruptcy Court's conclusion on the good faith issue for similarly situated creditors, Section 145, 11 U.S.C. §545, those procedural defects deprived other creditors of due process of law.

4/ While it is apparent that the tendering of the Chapter X petition to the Bankruptcy Court during the Alltrans hearing was not a filing of that petition under Rule 10-105(a) since it was not filed with the Clerk (see, §1(6) of the Act, 11 U.S.C. §1(6), and Bankruptcy Rules 509(a) and 902(3)), Bankruptcy Rule 509(c) required that that pleading be transmitted forthwith by the Bankruptcy Court to the Clerk's office.

II

Appellants' Application For The Appointment Of A Receiver Sufficiently Raised The Issue Of A Conflict Of Interest So As To Require A Hearing On That Issue, Especially In View Of Appellants' Oral Motion To Remove The Trustee

When the Bankruptcy Court considered appellants' Chapter X petition, it specifically refused to consider any evidence tendered to substantiate appellants' and other creditors' position that the Trustee and his counsel had a conflict of interest in considering what position the estate should take on appellants' petition under Chapter X. The Bankruptcy Court took that adamant stance because appellants had not filed a written motion under Rule 221 of the Bankruptcy Rules to remove the Trustee for cause. Tr. of 9/27/76 at 34-40. And at the conclusion of the Chapter X petition proceeding, the Court accepted the Trustee's argument that if the petition was dismissed, the Court need not reach the merits of the application for appointment of a Receiver. Intervenor BRAC respectfully submits that this was error, and that this error tainted the Chapter X proceeding so as to render it invalid.

Bankruptcy Rule 10-201(a) specifically provides for the appointment of a Receiver prior to approval of a Chapter X petition "when necessary in the best interest of the estate in an . . . adversary proceeding, or contested matter." Bankruptcy Rule 201 also pertains to the appointment of a Receiver and it amplifies Rule 10-201(a)(3) by specifying that a Receiver may be appointed to afford representation to the estate "when . . . the interest of the trustee may be adverse to that of the estate." Rule 201(a)(3). Appellants and many other applicant-creditors specifically relied upon both Rules 201 and 10-201 to support their application for the appointment of a

Receiver, and they alleged that the Trustee and his counsel had a conflict of interest in dealing with their Chapter X petition. Intervenor respectfully submits that this squarely and clearly raised the issue of whether a conflict of interest may exist and required a ruling on that issue and on the request for the appointment of a Receiver prior to either the formation of the Trustee's position on the Chapter X petition, or the Court's consideration of that position and answer.

Whether or not there is, in fact, a conflict is not at issue since Rule 201 provides for the appointment of a Receiver if there may be a conflict and, more importantly, appellants were never given the opportunity to present evidence on that issue for any Court's consideration. Since appellants were never given that opportunity before the trier of fact, the record is insufficient for this Court to rule on that issue. Intervenor BRAC wishes to make it very clear that it does not contend that there is, in fact, a conflict; BRAC merely asserts that the Bankruptcy Court should have given appellants an opportunity to prove an essential and material allegation to their motion for the appointment of a Receiver. Moreover, by allowing the Trustee to contest the petition before ruling on the petition, and by then dismissing the application to appoint a Receiver because it agreed with the Trustee on the Chapter X issue, the Court has placed the cart before the horse. Intervenor BRAC respectfully submits that this was error, and that it requires the proceedings to be remanded for an inquiry into the application for the appointment of a Receiver, and then into the Chapter X petition.

The Trustee's reliance on the lack of a written motion to remove the Trustee in order to quell any inquiry into his alleged conflict of interest is, it is respectfully submitted, misplaced. While Bankruptcy Rule 221(a) and Section 2a(17) of the Act, 11 U.S.C. §11a(17), do require a hearing upon notice before a Trustee may be removed, Rule 201(a)(3) does not require that the Trustee be removed before a Receiver can be appointed. In fact, Rule 201 contemplates the appointment of a Receiver while a Court is considering a Rule 221(a) application. Consequently, Rule 221(a) is inapposite to whether or not the conflict of interest question raised by appellants' application should be considered. If there were any question as to the relevancy of Rule 221(a), that should have been disspelled by appellants' counsel raising that issue by an oral motion. Tr. of 9/27/76 at 36-37. Section 2a(17) and Rule 221(a) both permit the court sua sponte to raise this issue. And while Bankruptcy Rule 707 does not appear to carry forward Rule 7(b) of the Federal Rules of Civil Procedure, it does not, it is submitted, prohibit oral motions. Since the integrity of the Trustee and the need for the avoidance of any conflict, or even the appearance of conflict, are so important in a Bankruptcy proceeding, it was error, it is submitted, for the Court not to sua sponte consider whether a conflict did indeed exist.

CONCLUSION

Intervenor BRAC respectfully submits that because of the lack of a fair opportunity to present evidence in support of the Chapter X petition, and because of the refusal of the Bankruptcy Court to even consider the conflict of interest issue, the order dismissing the Chapter X petition should be

vacated and this case remanded for a consideration of the application for appointment of a Receiver and then the Chapter X petition.

Respectfully submitted,

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December 8, 1976

APPENDICES

APPENDIX A

REPORT OF THE BANKRUPTCY COURT ON A PETITION FOR REORGANIZATION UNDER CHAPTER X OF THE BANKRUPTCY ACT FILED AGAINST THE ABOVE-NAMED BANKRUPTS.

9/28/76

OCT 26 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

In re	:	Bankruptcy Nos.
REA HOLDING CORPORATION	:	75 B 251
THE EXPRESS COMPANY		75 B 252
REA EXPRESS, INC., f/k/a/	:	75 B 253
Railway Express Agency, Inc.		75 B 254
REXCO SUPPLY CORPORATION,	:	
Bankrupts.	:	

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REPORT OF THE BANKRUPTCY COURT ON A PETITION FOR REORGANIZATION UNDER CHAPTER X OF THE BANKRUPTCY ACT FILED AGAINST THE ABOVE-NAMED BANKRUPTS.

A petition for reorganization of a corporation under Chapter X of the Bankruptcy Act (11 U.S.C. Chapter 10, Secs. 501-676) verified June 23, 1976 was filed against the above-named bankrupts by 10 unsecured creditors (the "Chapter X petition"). The matter was assigned for all purposes to Hon. Lloyd F. Mac Mahon, District Judge. On September 27, 1976 the District Judge remanded the matter to me under §117 of the Bankruptcy Act (11 U.S.C. §517), Rules of Bankruptcy Procedure 10-103 to hear and report on whether the Chapter X petition was filed in good faith.

A hearing was held by me on Monday, September 27, 1976 at 2:15 P.M. The petitioning creditors were represented by Wisehart, Friou & Koch by Arthur Wisehart, Esq. and Robert Friou, Esq. of counsel. The Trustee was represented by Whitman & Ransom, and Marcus & Angel,

William M. Kahn, Esq., Joshua J. Angel, Esq., and Donald L. Wallace, Esq., of counsel. The Debtor was represented by Anderson, Russell, Kill & Olick, Arthur Olick, Esq., of counsel. In making the findings of fact and conclusions of law set forth below, I considered all of the evidence presented to me, all statements of counsel, the transcript of a hearing before me in the above matter on November 5, 1975, November 6, 1975, the order to show cause dated May 24, 1976, bringing on for hearing an offer by Alltrans - U.S.A. (Alltrans) to purchase certain operating authorities of the bankrupt, the transcript of the hearings held on such order to show cause on June 23, 24, 25 and 30 and on July 1, 8, and 9, 1976, all exhibits submitted on that hearing, all briefs filed on that hearing, the Trustee's Brief submitted to Judge Mac Mahon, the Petitioner's Pre-Hearing brief filed by Petitioner's counsel prior to the hearing before me on September 27, 1976, my order and opinion of July 16, 1976, all of the information, testimony, financial data and all papers filed in this proceeding from February 18, 1975 to the present date, as well as my own impression of all witnesses and counsel who have appeared before me in this proceeding from February 18, 1975 to the date of this report.

At such hearing of September 27, 1976, I ruled that there is no issue presently before this Court with respect to whether or not any conflict of interest exists on behalf of the Trustee or his counsel for the reason that

no written motion to remove the Trustee has ever been filed with this or any other court nor has any notice of such a motion ever been sent to creditors, nor has any hearing date ever been set for such a written motion as required by Section 2a(17) of the Bankruptcy Act (11 U.S.C. §11). I therefore excluded from my consideration and I exclude from this all references and documents which attempt to raise or make any references or inferences with respect to any issues of conflict of interest by the Trustee and in particular I exclude items 4, 5, 6, 7, 9, and so much of item 8 as discusses any such conflict from the list of documents in the appendix to the petitioner's pre-hearing memorandum.

Therefore, the Court, being fully advised in the premises, makes the following findings of fact, conclusions of law and recommendation.

FINDINGS OF FACT

1) That the above-named bankrupts filed a petition for an arrangement under Chapter XI of the Bankruptcy Act on February 18, 1975.

2) That the debtor in possession operated its business from February 8, 1975 through November 6, 1975 inclusive.

3) That from February 18, 1975 through November 6, 1975, the debtor lost approximately $19,000,000 inclusive of any Chapter XI claims by employees and in excess of $12,000,000 exclusive of any Chapter XI claims by employees.

4) That on November 6, 1975, the debtor requested that it be adjudicated a bankrupt because it was unable to meet its current payrolls.

5) That from February 18, 1975 through November 6, 1975 the debtor promised its suppliers of goods and services that it would pay 40% of current operating expenses exclusive of payroll, that the debtor was unable even to pay such 40%.

6) That the debtor was adjudicated a bankrupt by order of this Court on November 6, 1975.

7) That on November 7, 1975 C. Orvis Sowerwine duly qualified as Trustee by filing his bond, which bond was approved by order of this Court dated November 7, 1975. That such Trustee has continued as such Trustee until the date of this report.

8) That on May 24, 1976 this Court signed an order bringing on for hearing on June 23, 1976 an offer by Alltrans to purchase all of the operating authorities of the bankrupt.

9) That notice of such hearing was given to all persons who had filed claims, which claims were docketed with the Clerk of this Court and further notice of such hearing was published in the New York Times, Wall Street Journal and Traffic World.

10) That the notice referred to in finding 9 was sufficient and if some creditors had not received such notice, any such defect was cured by publication in the New York Times, Wall Street Journal, and Traffic World and by the order confirming the sale.

11) That the petitioning creditors and their counsel had notice of such hearing and appeared at such hearing and no other person has raised any issue with respect to the adequacy of such notice.

12) That during the Alltrans hearing, counsel for REAEMCO, Inc. (REAEMCO), an unsuccessful bidder at the sale offered the within petition for reorganization under Chapter X of the Bankruptcy Act for identification as Exhibit 25 of REAEMCO and such exhibit was physically handed to the Bankruptcy Judge.

13) Neither REAEMCO, the petitioning creditors, nor their counsel ever paid any filing fee to the Clerk of this Court until September 7, 1976 at the earliest.

14) No original petition or copies of the original petition were delivered to the Clerk of the Court before September 7, 1976.

15) The Clerk of this Court has never issued any summons.

16) The Clerk of this Court never accepted any petition for reorganization under Chapter X of the Bankruptcy Act for any of the above-named bankrupts, nor accepted any filing fee prior to September 22, 1976.

17) On July 16, 1976 this Court handed down an opinion, findings of fact and order authorizing the Trustee to sell the operating authorities of the bankrupt to Alltrans.

18) By order dated July 27, 1976, this Court (Hon. Roy Babbitt, Bankruptcy Judge) approved a contract between the Trustee and Alltrans for the sale of the operating authorities.

19) That only REAEMCO appealed the decision of this court dated July 16, 1976 to the United States District Court. No appeal from the order of Judge Babbitt dated July 27, 1976 has been taken by anyone.

20) REAEMCO's appeal from the order of this Court dated July 16, 1976 was argued before the United States District Court (Hon. Henry Werker, D. J.) on August 28, 1976.

21) That after the argument of such appeal but prior to Judge Werker reaching any decision and on or about September 15, 1976 Judge Werker wrote a memorandum to the Clerk of this Court returning the appeal on the ground of the apparent filing by petitioners of a petition for reorganization under Chapter X of the Bankruptcy Act resulting in an automatic stay of all proceedings.

22) That the Clerk of this Court referred such petition to the Hon. Lloyd F. Mac Mahon District Judge who remanded such petition to me on September 27, 1976 to hear and report on the issues of good faith in accordance with Section 117 of the Bankruptcy Act, Rule 10-103 (2) of the Rules of Bankruptcy Procedure, and the Local Rule X-7.

23) That by June 23, 1976 the Trustee had sold all of the operating assets of the bankrupt except for the operating authorities and certain small isolated parcels of real estate. That all personalty whether located in such isolated parcels or not, have been completely sold.

24) That all operating personnel of the bankrupt have been discharged with the exception of certain employees of the REXCO division.

25) That the bankrupt has virtually no physical or tangible assets remaining other than cash, that there is no business left to be reorganized since the bankrupt no longer possesses the resources to be a going concern.

26) That the sole remaining assets in the bankrupt estate consist of between $6 and $7 million in cash, isolated small parcels of real estate and claims.

27) That all of the petitioning creditors are persons who would be entitled to a beneficial ownership interest in REAEMCO, if REAEMCO had been the successful bidder for the operating authorities.

30) That the liquidation being conducted by this Trustee is the best method of preserving the remaining values for those entitled to share in such values.

31) It is unreasonable to except that a plan of reorganization can be effected as a result of the filing of the Chapter X petition.

32) That the issue of conflict of interest sought to be raised by the petitioners against the Trustee and his counsel has not properly been raised before this Court, or any other court and is therefore not before this Court.

33) That without deciding whether the application for the appointment of a receiver should be granted if the Chapter X petition is approved, that unless a Chapter X petition is granted, there is no need for the appointment of a receiver.

34) That the debtor has generally appeared in this proceeding by its attorneys, and is opposed to the granting of the Chapter X petition for the reason inter alia that it believes that it is impossible that any plan of reorganization can be effected.

35) That since only one filing fee was paid to the Clerk of the Court, the present Chapter X proceeding may only apply to one bankrupt.

36) That such Chapter X petition has been filed only against the bankrupt REA Express, Inc.

CONCLUSIONS OF LAW

1) That the Chapter X petition was filed on September 22, 1976.

2) This Court is satisfied that the petition complies with the formal requirements of Chapter X and that this Court has jurisdiction to hear such petition.

3) That such Chapter X petition was not filed in good faith because it is unreasonable to expect that a plan of reorganization can be effected.

4) That the Chapter X petition was not filed in good faith because a prior proceeding is pending in this Court and it appears that the interests of creditors would be best subserved in such prior proceeding.

5) That such Chapter X petition was not filed in good faith under general equity principles.

RECOMMENDATION

I recommend that the Chapter X petition be dismissed because it was not filed in good faith. I further recommend that petitioners' application for the appointment of a receiver be in all respects denied.

IT IS ORDERED, that this Report shall be submitted to United States District Judge Lloyd F. Mac Mahon for hearing and approval at 2:15 o'clock on September 29, 1976 in Room 706, United States District Court House, Foley Square, New York City.

Dated: September 28, 1976.

/s/ J. Galgay
Bankruptcy Judge

APPENDIX B

MEMORANDUM ORDER OF UNITED STATES DISTRICT COURT

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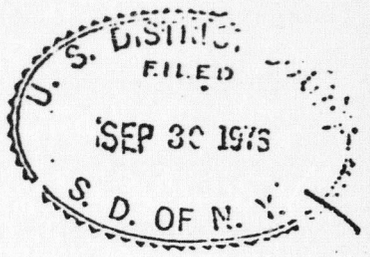

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of	:	Bankruptcy Nos.
REA HOLDING CORPORATION	:	75-B-0251
THE EXPRESS COMPANY, INC.		75-B-0252
REA EXPRESS, INC., f/k/a	:	75-B-0253
Railway Express Agency, Inc.		75-B-0254
REXCO SUPPLY CORPORATION,	:	
Bankrupts.	:	MEMORANDUM

45189

MacMAHON, District Judge.

This matter came before us on a motion, brought on by order to show cause, for the appointment of a Receiver to conduct the business of the bankrupt and take charge of its property, with power to do certain other acts as enumerated in the order to show cause.

Upon the return of the order to show cause, it appeared that time was of the essence due to the fact that a Chapter X petition had been filed automatically staying all further proceedings in the bankruptcy court and that there was a genuine issue of fact as to whether the Chapter X petition had been filed in good faith.

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The stay seriously prejudiced the estate in that a sale of operating rights, approved by the bankruptcy court and requiring approval of the Interstate Commerce Commission, might be irreparably impaired. It also appeared that a petition for review of the bankruptcy court's approval of the sale was pending before Judge Werker of this court and decision of that matter would necessarily be delayed while the stay remained in effect.

The matter came before us while we had just commenced a serious criminal trial, and since it appeared that Judge Galgay was thoroughly familiar with all of the bankruptcy proceedings, including the subject matter of the Chapter X petition, and because time was of the essence, we therefore referred the matter to Judge Galgay to hear and determine the issue of whether the petition for reorganization under Chapter X of the Bankruptcy Act, verified June 23, 1976, was filed in good faith. Judge Galgay heard and determined that issue and filed a report containing his written findings of fact and conclusions of law on September 28, 1976.

On September 29, 1976, we heard an oral motion by Whitman & Ransom, and Marcus & Angel to confirm Judge Galgay's report and also heard Wisehart Friou & Koch's objections in opposition thereto.

We have carefully considered the report of Judge Galgay, the proofs of the parties, and the transcript of the evidence on the hearing before Judge Galgay, and, while more time might improve the fullness of this memorandum, it would not alter our opinion and would only jeopardize the bankrupt estate.

We reject petitioners' contentions that Judge Galgay's findings are clearly erroneous. On the contrary, we find said findings supported by substantial evidence and therefore adopt his findings of fact and conclusions of law in all respects. Specifically, we find that the petition under Chapter X was not filed in good faith and accordingly dismiss the petition and vacate any stay.

So ordered.

Dated: New York, N.Y.
September 30, 1976

Lloyd F. MacMahon

LLOYD F. MacMAHON
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-5039

In re

REA HOLDING CORPORATION, et al.

Bankrupts,

MATTHEW E. MANNING, et al.

Creditors-Appellants and Intervenor

v.

C. ORVIS SOWERWINE, Trustee in Bankruptcy

Appellee.

CERTIFICATE OF SERVICE

I hereby certify that I have today served the Brief of Intervenor Brotherhood of Railway and Airline Clerks in Docket No. 76-5039 upon all parties to that case by mailing a copy thereof, properly addressed, with first-class postage prepaid, to counsel for each such party, as follows:

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Counsel for Appellee C. Orvis Sowerwine, Trustee in Bankruptcy.

Dated this 8th day of December, 1976

John O'B. Clarke, Jr.